

U.S. Department of Labor

**Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, Virginia 23606-1904**



(757) 873-3099 (Tel) – (757) 873-3634 (Fax)

Date: March 9, 2001

Case No.: 2000-LHC-1966

OWCP No.: 5-56160

In the Matter of

BAILEY HALL, III,

Claimant

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,

Employer

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party in Interest

Appearances:

Robert E. Walsh, Esq., for Claimant
Jonathan Walker, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for a back injury alleged to have been suffered by Claimant, Bailey Hall, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33

U.S.C. § 948(a). (Hereinafter “the Act”). Claimant alleges that he injured his back while employed by Employer and, that as a result, he is permanently partially disabled. Additionally, Employer seeks relief payment of compensation under § 8(f) of the Act.

The claim was referred by the Director, Office of Workers’ Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was conducted on November 6, 2000. (Tr.)¹ At the hearing, the parties submitted stipulations of fact resolving all issues except Employer’s request for relief under § 8(f). (Tr at 6-7.) Claimant submitted seven exhibits, Cx 1 through Cx 7, which were admitted without objection. (Tr at 10.) Employer submitted seven exhibits, Ex 1, Ex 3-4, Ex 6, Ex 8-9, and Ex 11. Ex 1 through 5 and Ex 8 were admitted without objection. (Tr at 11.) The record was held open for 30 days for Employer’s brief and 45 days for Director’s brief. An extension for filing of briefs was granted on January 8, 2001. Employer’s brief was received on February 12, 2001. The Director’s brief was received on February 26, 2001.

STIPULATIONS

The Claimant and Employer stipulated to the following facts on the record: (Tr at 6)

1. Mr. Hall sustained an injury arising out of and in the course of his employment on October 2, 1985;
2. That timely notice of the injury and timely claim for compensation were given and filed by the employee;
3. That his average weekly wage at the time of the injury was \$363.45;
4. That Mr. Hall reached maximum medical improvement in regard to that injury on August 9 of 1990, which is shown in the medical report of Dr. Tieseng of that date;
5. That, as a result of the injury and his permanent restrictions, Mr. Hall is permanently unable to return back to his full pre-injury duties;
6. That Mr. Hall was last paid voluntarily compensation benefits by the Employer for this injury on June 15, 1993, as reflected in Cx 7;
7. Mr. Hall was passed out of work by his Employer on June 15, 1998 and on that date and since that date there has been no suitable light duty employment with the Employer;

¹ Tr- Transcript; Ex- Employer’s exhibit; Cx- Claimant’s exhibit; and Jx- Joint Exhibit.

8. Mr. Hall has worked since that date in a position as a custodian with the Suffolk Public School System and it is agreed by the parties that his earnings in that position which he held for over a year constitute his residual wage earning capacity;
9. His earnings for that job, when taken as of the time of his injury are \$4.95 per hour;
10. Mr. Hall worked a 39 hour work week, therefore, we would agree that those earnings, that is, \$4.95 per hour for a 39-hour work week would constitute his wage earning capacity, and that would be \$193.05 a week;
11. We agree that he has been and is entitled to permanent partial disability from June 15, 1998 and continuing based on the difference between his average weekly wage and the \$193.05;
12. The parties consent to an order being entered, awarding him the permanent partial disability at that rate and continuing;
13. The only issue left for the court would be whether the Employer is entitled to Section 8(f) relief on this claim.

These stipulations have been admitted into evidence and are therefore binding upon Claimant and Employer. 20 C.F.R. § 18.51; *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). The undersigned has carefully reviewed the foregoing stipulations and finds that they are reasonable in light of the evidence in the record. As such, the same are hereby accepted as my findings of fact.²

ISSUE

The sole issue remaining in dispute is whether the Employer has established its entitlement to relief under § 8(f) of the Act.

DISCUSSION

Section 8(f) of the Act was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *See C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or

² Although the parties did not stipulate to jurisdiction under the Act, none of the parties have opposed jurisdiction. Therefore, jurisdiction will be assumed.

subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. *See Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also* H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, *Workers' Compensation Law* § 59.00 (1992). In furtherance of this goal, the provisions of § 8(f) are to be liberally construed. *See Director v. Todd Shipyard Corp.*, 625 F.2d 317 (9th Cir. 1980).

Under § 8(f) of the Act and its implementing regulations contained at 20 C.F.R. § 702.321, there are three prerequisites for employer eligibility for special fund relief: (1) the claimant must suffer from a pre-existing permanent partial disability; (2) the pre-existing condition must have been “manifest” to the employer; (3) the claimant’s total disability must not be the sole result of the new injury. *See* 33 U.S.C. § 908(f); *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Shaw v. Todd Pacific Shipyards*, 23 BRBS 96 (1989); *Dugan v. Todd Shipyards*, 22 BRBS 42 (1989). When the combination of the claimant’s pre-existing disability and the new injury or aggravation results in permanent partial disability rather than permanent total disability, the employer must also establish that the resultant disability is materially and substantially greater than that which would have otherwise been expected. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175 (4th Cir. 1993); *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996). The employer (or insurance carrier) bears the burden of establishing its eligibility for § 8(f) relief. *See* 20 C.F.R. § 702.321; *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982). If the employer carries this burden, its obligation is to provide compensation for the applicable prescribed period of weeks provided for in § 8(f)(1) for the subsequent injury, or for one hundred and four weeks, whichever is the greater. After the employer’s liability for compensation is discharged, further payments to the claimant are made by the Special Fund.

The first question to address is whether Claimant had a pre-existing permanent partial disability prior to the subject injury. In this regard it is not necessary for the pre-existing disability to have caused an economic loss. *See Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *C&P Telephone v. Director OWCP*, 564 F.2d 503 (D.C.Cir. 1977). Rather, this first requirement is satisfied if it is shown that:

the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

Lockheed Shipbuilding, 25 BRBS at 87 (CRT) (*citing C&P Telephone Co.*, 564 F.2d at 513.)

In this case, Employer argues that Claimant had a pre-existing back disability. Employer states, through the report of Dr. Hall, that

Claimant's disability is a result of his repeat back injuries from 1981 through 1985, and that each of these injuries permanently weakened the back disc structure, making Mr. Hall more susceptible to further injury, and his claimed injury aggravated and permanently worsened his chronic back injury with a congenital defect, furthering the process until finally his work restrictions were increased.

(Ex 8 at 2.)

Employer bases its claim on three incidents. First, Employer argues that Claimant suffered a back injury in 1981 when he was pulling cable. (Employer's brief at 5.) Evidence of this accident is found in Claimant's testimony and several records of Employer. Claimant testified that he sustained an injury to his back in 1981. (Tr at 12-13.) As a result of that injury, Claimant stated that he was treated by Dr. Kells and received several work restrictions which prevented him from driving, prolonged sitting, heavy pushing and lifting more than 15-20 pounds. (Ex 8 at 5.) Within weeks, Claimant stated that his work restrictions were expanded to prevent repeated bending and stooping and also added 5 minute stretch breaks throughout the day. (Ex 8 at 7.)

The medical records also indicate that an injury occurred in March of 1981. An attending physician's report, which Employer contends was dated April 14, 1981, states that Claimant was injured pulling cables and lifting on March 23, 1981. (Ex 8 at 6.) On April 20, 1981, Claimant was restricted to avoiding heavy lifting, pushing, pulling, repeated bending and stooping, and was told to add intermittent rest periods of 5 minutes and stretching every two to three hours until April 27, when the Claimant would be re-evaluated in the Employer's clinic. (Ex 8 at 7.) In a report dated July 21, 1981, Dr. Kells instructed Claimant to return to work on July 17, 1981, and changed his restrictions to do limited work including no heavy lifting more than 15-20 pounds, no prolonged sitting, no driving, and no heavy pushing. (Ex 8 at 5.) On November 11, 1981, Dr. Bobbitt changed Claimant's restrictions to lifting no more than 30 pounds and limit bending for two weeks. (Ex 8 at 8.) Dr. Douglas Kells indicated on February 19, 1982, that Claimant was put on permanent restrictions to not pull cables. (Ex 8 at 9.)

Second, Employer argues that Claimant injured his back again on August 30, 1982. (Employer's brief at 5.) Claimant testified that he was injured again on that date, (Tr at 13), and the medical records support his testimony. An attending physicians report, with no date and no signature, states that Claimant was injured on August 30, 1982, as he was pulling a cable causing a tender lumbrosacral area on September 3, 1982, a tender midline on September 10, 1982, and low back pain on September 24, 1982. (Ex 8 at 10.) A report from Dr. Langel dated August 30, 1982, states that Claimant was convalescing from an illness sustained that day and should be restricted to no heavy pushing, pulling or climbing vertical ladders for one week. (Ex 8 at 11.)

The office note of Dr. Douglas Powell, dated November 2, 1982, indicate that Claimant was pulling a cable on August 30, 1982 and felt pain in his back. (Ex 8 at 12.) Dr. Powell notes indicate that Claimant had suffered a similar accident in 1981 in which Claimant stayed out for a long time and was on light duty for a long time. (*Id.*) An exam revealed no neurological problems. (*Id.*) X-rays showed no spondyloysis, although there was a very narrow pars interarticularis at the fifth lumbar

vertebra, which made it weaker in comparison to the other joints. (*Id.*) Dr. Powell's impressions were that Claimant's symptoms were far out of proportion to his physical findings. (*Id.*) He also felt Claimant was not suited for the type of work he is doing and he would encourage him to seek a lighter occupation, particularly in view of the x-ray evidence of a potential problem at the L5-S1. (Ex 8 at 12.)

On December 3, 1982, Dr. J. Harmon states that Claimant should avoid heavy lifting or pulling with his back indefinitely due to injuries suffered on March 23, 1981, and August 30, 1982. (Ex 8 at 13.) Under the heading "Remarks", Dr. Harmon stated that Claimant "has had two weak-related injuries to his back and has congenital back problem. Is not suited for the 'bull gange.' Recommend that he be assigned to different job in X31." (EX 8 at 13.)

Third, the evidence shows that Claimant injured his back again sometime in 1983. Claimant testified that he injured his back on in 1983 while he was grinding. (Tr at 13.) The medical records also support this evidence. An attending physicians report, dated December 13, 1983 and signed by Dr. C. Root, states that Claimant was grinding on November 30, 1983, and noticed pain in his lower back. (Ex 8 at 14.) Dr. Root diagnosed a right lumbar strain by history, but determined that the lumbar strain was not related to the grinding. (*Id.*) On January 14, 1985, Dr. Bobbitt restricted Claimant to no lifting over 20 pounds, no repetitive bending, no crawling, no reaching overhead, and no pushing or pulling for 30 days due to the November 30, 1983 injury. (Ex 8 at 15.)

The Director argues that there was no medical support for Dr. Hall's conclusions that Claimant suffered from a serious long lasting physical problem due to back injuries because the reports submitted in support of the application do not refer to any credible evidence supporting the conclusion that Claimant suffered any serious lasting problems. (Director's brief at 5.) I disagree.

To the contrary, there is evidence that Claimant suffered lasting physical problems in that he was given permanent restrictions by Dr. Kells to not pull cables. (Ex 8 at 9.) He was put on permanent restrictions by Dr. Harmon to avoid heavy lifting or pulling with his back and recommended that Claimant be assigned to different job. (Ex 8 at 13.) Even Dr. Powell, who is not employed by Employer and thought Claimant was malingering, found a weak joint in Claimant's back and recommended that Claimant should seek a lighter occupation. (Ex 8 at 12.)

In addition, the Board has held that a history of prior back problems can be an existing permanent partial disability for purposes of § 8(f). *Rowe v. Western Pacific Dredging*, 12 BRBS 427 (1980); *Padilla v. Marine Terminals*, 8 BRBS 153 (1978). In *Padilla*, the claimant injured his back while in the course of his employment. *Padilla*, 8 BRBS at 154. The claimant had previously injured his back three times in the course of his employment, for which he had received settlements and after which he had fully recovered and returned to work. (*Id.*) One co-worker testified at the hearing that the claimant never complained and another testified that he never noticed a problem in the claimant's ability to perform work. (*Id.*) The Board said this history of three previous back injuries posed the sort of increased compensation risk that would motivate a cautious employer to discharge an employee. *Padilla*, 8 BRBS at 156.

The term “disability”, as used in § 8(f)(1) is not a term of art. *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949) It is not necessary for the preexisting disability to have caused an economic loss. See; *C & P Telephone v. Director OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). “Section 8(f) is to be read broadly, and this provision thus may encompass persons who are disabled but who do not meet the standards of disability set forth in other statutory schemes.” *Preziosi v. Controlled Indus.*, 22 BRBS 468, 473 (1989.) Claimant need not have been classified with an impairment rating in order to establish a pre-existing disability.

Therefore, I find that Claimant’s prior back injuries qualify as pre-existing permanent partial disabilities under § 8(f).

The second requirement for § 8(f) relief will be met if the employer had actual or constructive knowledge of the worker’s preexisting disability prior to the subject injury. Constructive knowledge will be established by medical records shown to be in existence at the time of the subject injury from which the preexisting condition was objectively determinable. *Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 457, 8 BRBS 498, 504 (3d Cir. 1978).

In this case, Employer had both actual and constructive knowledge of Claimant’s pre-existing disability. The medical evidence establishing Claimant’s pre-existing back problems were in Employer’s possession or on Employer’s forms. Therefore, Employer had actual knowledge of all the injuries Claimant had suffered. Employer also had constructive knowledge of Claimant’s pre-existing back problems as the notes of Dr. Powell, which state that Claimant suffered from a weakened L5-S1 joint were, in existence at the time Claimant was injured in 1985. Therefore, Employer also had constructive knowledge.

Therefore, I find that Employer has established that the injury was manifest to it.

The third requirement for § 8(f) relief is that Employer must show that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. In order to satisfy this requirement, the Employer must present evidence of the type and extent of disability the Claimant would have suffered if not previously disabled when he suffered his back injury on October 2, 1985. *Harcum*, 8 F.3d at 185. A showing of this kind requires an employer to present evidence of the type and quantification of the extent of disability that the Claimant would have suffered if not previously disabled when injured by the same work-related injury. (*Id.*)

In support of this element, Employer offered a letter from Dr. James. H. Hall to show that the 1985 injury contributed to Claimant’s overall disability. Dr. Hall stated on February 8, 1993, that:

[Claimant’s] disability was not caused by his 1985 back injury alone, but rather his disability is materially contributed to and made materially and substantially worsened by his pre-existing back injury and back defect. [Claimant’s] 1985 injury was rather minor. If he had a normal back, the injury would have resolved with no permanent disability,

however, the injury aggravated [Claimant's] already weakened back structure. [Claimant's] disability is a result of his repeat back injuries from 1981 through 1985, and that each of these injuries permanently weakened the back disc structure, making Mr. Hall more susceptible to further injury, and his claimed injury aggravated and permanently worsened his chronic back injury with a congenital defect, furthering the process until finally his work restrictions were increased. I believe [Claimant], however, can work light duty work at the Shipyard even with his back restrictions and impairment. If [Claimant] is disabled from Shipyard work, it is due to this carpal tunnel syndrome which pre-dated his October 2, 1985 back injury.

(Ex 8 at 1.)

However, it is not clear from Dr. Hall's report whether he reviewed the medical reports for the injury at issue. Although he lists the medical reports of the pre-existing back injuries in detail and states that "I or one of my staff have examined and treated [Claimant] for his injury", Dr. Hall never mentions any medical reports from Claimant's October 2, 1985 back injury. (Ex 8 at 2.) In fact, the only medical records Dr. Hall mentions from 1985 are when Claimant was diagnosed with carpal tunnel syndrome. (Ex 8 at 2.)

Dr. Hall only mentions that Claimant's 1985 injury was a back injury twice (once when he states that if Claimant is disabled from working at the Shipyard, it is from his carpal tunnel syndrome, and once when he states that Claimant's disability is not caused by his 1985 back injury alone, but is contributed to by his pre-existing back injury and back defect.) (Ex 8 at 2.) The other times it is mentioned, Dr. Hall uses the term "injury" or "industrial injury", thus making it unclear to whether he is referring to Claimant's back injury or to his carpal tunnel syndrome.

Dr. Hall also misstates the date of maximum medical improvement. Dr. Hall states that Claimant "reached maximum medical improvement from his 1985 industrial injury on or before January 14, 1991, when he was given permanent work restrictions." (Ex 8 at 2.) The parties stipulated, and the evidence of Dr. Tieseng shows, that Claimant reached maximum medical improvement on July 12, 1990 when he was given permanent restrictions. (Tr at 12; Cx 1j.) None of the evidence in the record supports Dr. Hall's assertion, thus, it seems unlikely that he actually reviewed the 1985 back injury records.

The United States Court of Appeals for the Fourth Circuit, where this case arises, has considered the sufficiency of evidence presented of the type and quantification of the extent of disability that the Claimant would have suffered if not previously disabled when injured by the same work-related injury. The Court held that, in considering a § 8(f) request, an Administrative Law Judge must not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which the conclusions are based. *Director, OWCP v Newport News Shipbuilding and Dry Dock [Carmines]*, 138 F.3d 134, 140 (4th Cir. 1998).

Dr. Hall's report is confusing and contradictory. It is unclear as to what his understanding of the injuries at issue are because he uses ambiguous terminology. It is equally unclear whether Dr. Hall reviewed the records on Claimant's 1985 back injury as he never mentions the medical records or the facts of the injury. As a result, I cannot credit his unsupported assertion that Claimant's injury would have resolved with no permanent disability had Claimant had a normal back.

Accordingly, I find that Dr. Hall's report is not sufficient to quantify the extent of the disability Claimant would have suffered if not previously disabled. Thus, I find that the Employer has not shown that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone.

Employer's request for Special Fund relief must be denied.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, shall pay to Claimant, Bailey Hall, III, Claimant, compensation for permanent partial disability from June 15, 1998 and continuing based on a compensation rate of \$113.60 per week ((AWW \$363.45 - \$193.05 = \$170.40) X 2/3 = \$113.40));
2. Employer's request for relief under § 8(f) of the Act is Denied;
3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);
4. All computations are subject to verification by the District Director; and
5. Claimant's attorney, within 20 days of receipt of this order shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

RICHARD E. HUDDLESTON
Administrative Law Judge

